

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of an Investigation Regarding  
Qwest's Compliance with Section 271 of the  
Telecommunications Act of 1996 with  
Respect to the Provisions of InterLATA  
Services Originating in Minnesota

PUC Docket No. P-421/CI-96-1114  
OAH Docket No. 12-2500-14473-2

In the Matter of a Commission Investigation  
into Qwest's Compliance with Section  
271(c)(2)(B) of the Telecommunications Act  
of 1996; Checklist items 3, 7, 8, 9, 10, and  
12

PUC Docket No. P-421/CI-01-1370  
OAH Docket No. 12-2500-14485-2

In the Matter of a Commission Investigation  
into Qwest's Compliance with Section  
271(c)(2)(B) of the Telecommunications Act  
of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13,  
and 14

PUC Docket No. P-421/CI-01-1371  
OAH Docket No. 7-2500-14486-2

In the Matter of a Commission Investigation  
into Qwest's Compliance with Section 272 of  
the Telecommunications Act of 1996's  
Separate Affiliate Requirement

PUC Docket No. P-421/CI-01-1372  
OAH Docket No. 7-2500-14487-2

In the Matter of a Commission Investigation  
into Qwest's Compliance with Section  
271(d)(3)(C) of the Telecommunications Act  
of 1996 That the Requested Authorization is  
Consistent with the Public Interest,  
Convenience and Necessity

PUC Docket No. P-421/CI-01-1373  
OAH Docket No. 6-2500-14488-2

In the Matter of the Commission's Review  
and Investigation of Qwest's Unbundled  
Network Element (UNE) Prices

PUC Docket No. P-421/CI-01-1375  
OAH Docket No. 12-2500-14490-2

In the Matter of the Request of Covad to  
Define and Price a Line Sharing over DLC  
UNE to be offered by Qwest

PUC Docket No. P-421/CI-02-293  
OAH Docket No. 12-2500-14765-2

## **TWENTY-THIRD PREHEARING ORDER**

This matter came on for a telephone prehearing conference before Administrative Law Judge Richard C. Luis on July 25, 2002.

The following persons noted their appearances at the prehearing conference:

John Devaney and Cara Sacilotto, for Qwest.

Letty Friesen and Janet Browne, for AT&T.

Megan Dobernack for Covad.

## **DISCOVERY ISSUES**

1. AT&T and Qwest have been engaging in discovery regarding Qwest's "win-back" activities. Covad and Qwest have been engaging in discovery regarding Qwest's provision of xDSL service, particularly on shared loops. Disputes have arisen in the course of that discovery. Qwest moved for an order compelling answers to a number of its information requests to both AT&T and Covad. Each motion will be discussed separately.

## **MOTION TO COMPEL AT&T RESPONSES**

2. Qwest requested that AT&T provide information regarding the contention that Qwest has engaged in "win-back" activities using local service requests (LSRs). Information requests (IRs) 1 through 4 ask AT&T to provide documents supporting the claim of Qwest's improper use of LSRs as set out in the Rea and Clemmens affidavits filed by AT&T. AT&T responded to the IRs by stating that its investigation is ongoing and that information uncovered by the investigation would be transmitted to Qwest as it is obtained by AT&T. Qwest asserts that it needs the information requested to assess the factual basis for proffered testimony. The Rea and Clemmens affidavits speak for themselves. The Judge has previously ruled that AT&T's obligation to answer information requests 1-4 is ongoing. There is nothing in the record of this motion to suggest that AT&T has information responsive to the IRs that has not been provided to Qwest. Accordingly, Qwest's motion to compel answers to IRs 1-4 is DENIED.

3. AT&T has asserted attorney work product privilege regarding IR 4b. In that IR, Qwest requested that AT&T disclose the scope, conduct, and breadth of AT&T's investigation into Qwest's win-back activities. Qwest disputes the applicability of attorney work product to the information sought. As described above, AT&T's investigation is ongoing. The disclosure of the details of that investigation, at this time, would necessarily disclose the legal theories and mental impressions of counsel while the investigation is underway. Protecting such theories and impressions is the essence of the work product privilege. Qwest's motion to compel answers to IR 4b is DENIED.

4. Since Qwest is seeking the information for the ultimate purpose of assessing the weight to be given the results of the investigation, there is no harm to Qwest in awaiting the conclusion of AT&T's investigation before the IR must be answered. Should Qwest need to supplement its testimony in light of AT&T's response, provision for such additional testimony can be made available. AT&T's ongoing obligation under IR 4b is to answer the questions as soon as the investigation is completed.

5. Qwest's IR 5 seeks logs maintained by AT&T regarding AT&T's contacts with the customer. AT&T objected to the IR as not leading to evidence relevant to Qwest's winback activities. Qwest asserted that the AT&T contact with the customer constitutes the "trigger date" when the allegedly improper winback activity begins. AT&T disagreed with that assessment, indicating that the transmittal of the local service request (LSR) from AT&T to Qwest begins the relevant period. The LSRs are already in Qwest's possession.

6. As discussed in the Fifteenth Prehearing Order, the winback allegations maintain that Qwest is improperly using a CLEC's proprietary information contained in the LSR to conduct winback marketing prior to the changeover of local service from Qwest to the CLEC. Contacts between AT&T and the potential customer prior to submission of the LSR are irrelevant to the winback allegation. Qwest's motion to compel answers to IR 5 is DENIED.

7. Qwest's IR 6 inquires into how the logs identified in IR 5 are maintained. IR 6 is no more relevant than IR 5. Qwest's motion to compel answers to IR 6 is DENIED.

### **MOTION TO COMPEL COVAD RESPONSES**

8. Qwest requested that Covad answer 19 IRs regarding the provision of xDSL services, particularly regarding Covad's contention that Qwest's Raw Loop Data Tool (RLDT) returns inaccurate or incomplete information. The RLDT is used by a CLEC seeking to provide xDSL services to a customer on a shared-line basis. The CLEC uses the RLDT to "prequalify" the customer. Prequalification is a determination that the particular loop that serves a customer does not have some technical impediment (such as distance of the customer from the central office or presence of incompatible equipment on the loop). The RLDT is a Qwest tool made available to CLECs. Instructions for using the RLDT are also made available by Qwest.

9. IR 3 requests that Covad provide information about any business relationship or joint advocacy position between Covad and AT&T. Qwest maintains that "Covad is making allegations and claims that advance AT&T's interests so that AT&T will have a party to support its position."<sup>[1]</sup> Covad asserts that there is no joint advocacy position, that business relationships are inevitable in the telecom industry, and that the substance of the IR is proprietary. Qwest has not shown that its IR will lead to the discovery of relevant evidence. Qwest's motion to compel answers to IR 3 is DENIED.

10. IRs 8 and 11 request that Covad provide details about what technical specifications are required by Covad to provide xDSL services to customers. Covad objected to the IRs as being irrelevant to the issues in this proceeding and requesting extremely sensitive proprietary data that constitutes the core of Covad's business. Qwest characterized the Camarota testimony as asserting that the RLDT is inadequate to assess loops for Covad's particular technical specifications.

11. Covad has not asserted that the RLDT fails to provide an information field needed to prequalify a customer. Covad has asserted that existing fields in the RLDT are not populated or are incorrectly populated when that tool is run by CLECs. Further, Covad asserts that Qwest has other, more accurate databases that it uses when assessing loops for Qwest customers. The issue raised by the Camarota testimony is whether Qwest discriminates against CLECs in the provision of prequalification information. The technical specifications of Covad's provision of xDSL are irrelevant to the accuracy and completeness of information provided by the RLDT. The Judge is convinced that Covad has only taken issue with the results generated by the RLDT that are needed for provisioning xDSL to potential customers.<sup>[2]</sup> Qwest's motion to compel answers to IRs 8 and 11 is DENIED.

12. Qwest IRs 6, 7, 12 and 13 inquire as to what documentation (1) is used in the training of Covad employees for using the RLDT, (2) is maintained for the web-based RLDT, and (3) is held by Covad to substantiate claimed problems with the RLDT. Covad responded that the processes have been fully described and the documentation sought in the IRs about how the RLDT is used does not exist. Regarding documentation of problems, Covad indicated that the information provided to Qwest in the Arizona, Colorado, and Washington 271 proceedings responds to IR 13. Covad relies upon Minn.R.Civ.P. 33.03 (allowing the identification of business records already in the possession of the requesting party) in asserting that the IR was properly answered. Covad also supplemented its answer to IR 13 with purchase order numbers (PONs). These orders were placed with Qwest after prequalification using the RLDT. Each PON received a jeopardy notice due to the presence of incompatible equipment on the loop not shown in the RLDT results.<sup>[3]</sup>

13. Qwest asserts that under *Mixed Blood Theatre v. County of Hennepin*, 1987 WL 9154 (Minn.Tax), Covad cannot refer to information coming from other proceedings to meet its discovery obligation. Covad responded that the precedent relied upon by Qwest is factually very different from the situation here. In *Mixed Blood Theatre*, the filings were with other governmental entities, no list of those filings was maintained, and no showing was made of a burden on the producing party.<sup>[4]</sup> In this matter, by contrast, Covad provided this information to Qwest (to the same counsel requesting it again here). Covad has supplemented this response with the other information that reflects on the issue. Under Minn.R.Civ.P. 33.03, it is appropriate for Covad to identify the data already provided to Qwest in earlier proceedings as constituting its response here. To the extent that Qwest is requesting "screen shots" (printouts of computer screens documenting the information contained), Covad has indicated that it has none.<sup>[5]</sup> Qwest's motion to compel answers to IRs 6, 7, 12 and 13 is DENIED.

14. Qwest has moved to compel specific statements from Covad as answers to IRs 16, 17 and 18. Qwest asserts that Covad must be compelled to “formally state that it has no additional documents or evidence in its possession or to produce what it has.”<sup>[6]</sup> The Judge has examined Covad’s responses and supplemental responses to these IRs. Covad’s answers are adequate to respond to Qwest’s IRs. Qwest’s motion to compel answers to IRs 16, 17 and 18 is DENIED.

Dated: July 31, 2002

/s/ Richard C. Luis  
RICHARD C. LUIS  
Administrative Law Judge

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<sup>[1]</sup> Qwest Motion to Compel Responses by Covad, at 7.

<sup>[2]</sup> Covad would harm its business by refusing to provide xDSL services to customers based on irrelevant prequalification data. Further, the RLDT is not CLEC-specific. Any CLEC seeking to offer xDSL services over Qwest-owned loops must use the same tool.

<sup>[3]</sup> Covad Response, Exhibit 1, at 10.

<sup>[4]</sup> ***Mixed Blood Theatre v. County of Hennepin***, 1987 WL 9154 \*1 (Minn.Tax).

<sup>[5]</sup> Presumably, Covad would have presented such documents already as supportive of its claims if such documents were in Covad's possession.

<sup>[6]</sup> Qwest Motion to Compel, at 9.